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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,
Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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December 1958.

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Appellee moves to dismiss the appeal on the ground that it does not present a substantial Federal question. In support of his motion appellee argues that the issue is not novel or unsettled and that the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court but is indistinguishable from and wholly based on the decisions of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

ARGUMENT

I

The decision of the Court of Appeals of New York is in direct conflict with decisions of this Court.

(1)

Conflict with decision in *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422.

In *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422 (1947), this Court had before it the question of whether the New York City General Business and Financial Tax, the same tax here before the Court, as applied to the gross receipts from interstate commerce, stevedoring activities, carried on wholly within the territorial limits of the City of New York was in violation of the Commerce Clause. In that case the City argued that the holdings of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), among others, had in effect overruled this Court's decision in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and that the reasons which underlay that decision no longer controlled in judicial examination of the constitutionality of state taxation of gross proceeds derived from interstate commerce. However, this Court held that the Washington State tax on the privilege of doing business measured by gross receipts involved in *Puget Sound* was "indistinguishable from that laid by New York City in this case," and reaffirmed the rule of *Puget Sound*.

It was there held that a tax on gross receipts of interstate commerce "or upon the privilege of conducting the business" of interstate commerce, measured by those gross receipts is invalid. In addition to the possibility of multiple taxation the court stated, p. 433, " 'What makes the tax in-

valid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences." This Court repeated at p. 432 its condemnation of taxes on the privilege of doing business as a forbidden regulation of interstate commerce set forth in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 48 (1940).

The decisions in *Wood Preserving* and *Harvester* on the Indiana Gross Income Tax and in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (1938); *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), and *McGoldrick* v. *Berwind-White Co., supra,* were reviewed and reaffirmed and distinguished from the *Puget Sound* decision on the basis of the difference between the type of tax involved in those cases and the type of tax in *Puget Sound* and the New York City business tax here. The Court referring to the *Wood Preserving* group of cases stated, p. 433:

> "Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions."

The decision of the New York State Court of Appeals that the *Wood Preserving* and *Harvester* cases are indistinguishable from this case and that the Indiana tax and the New York City tax here are similar is directly contrary to the decision of this Court in *Joseph* v. *Carter & Weekes.*

(2)

Conflict with decisions on interstate commerce.

The initial specific issue raised in this case below was whether the means of transport is the sole criterion of interstate commerce where beer brewed in Brooklyn is sold to distributors located and doing business outside New York State who had the beer picked up by trucks at the brewery and transported out of New York.

Receipts from sales where the beer was transported by common carrier trucks were, in accordance with Article 209 of appellee's Regulations (p. 23, Appendix B of Statement as to Jurisdiction), determined to be from interstate commerce and allocated. Receipts from sales where transportation was by contract carriers and distributors' own trucks were determined to be from intrastate commerce and wholly taxable. Article 209 of the Regulations was admitted by appellee's counsel below to have been based on a dictum in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395 (1930), where in sustaining a sales tax it was said that if the oil had been delivered by the Mississippi seller to "a common carrier" for transportation to Louisiana the sale might not be taxable. This regulation is the type of legal fiction condemned by this Court in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), where it was stated, p. 659, "To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the *Lehigh Valley* case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction." The decision of the Court of Appeals of the State of New York confirming this application of the regulation conflicts with decisions of this Court cited at p. 6 of the Statement as to Jurisdiction which are not distinguishable as appellee contends in his motion.

The concept of "commerce • • • among the several States" in the Constitution is the same in granting Con-

gress power to regulate as in restricting the states' powers. Therefore, the decisions of this Court which define and describe interstate commerce are of equal applicability and force whether they were rendered in cases dealing with questions of Federal jurisdiction under Congressional enactments or the states' power to tax.

Transportation by common carrier is evidentiary and significant only in determining whether transportation in interstate or foreign commerce has started at a given moment or day as when a tax is assessed on property on a set day, or in determining the certainty of a destination of goods delivered as is necessary for a sales tax. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69 (1946). For the purposes of computing the exaction of the New York City business tax the means of transportation is of no significance because the determination of the receipts of the business and their character is based on the calendar year and after it has closed and transportation to destination has been completed. New York City Administrative Code, Section B46-2.0 and Regulations 104, Appendix B, Statement as to Jurisdiction, pp. 21-23.

The decision of the Court of Appeals in determining tax liability in this case on the basis of delivery to a particular type of carrier is therefore in conflict with the additional decisions of this Court on the nature of interstate commerce.

II

Danger of interference with interstate commerce is real and substantial.

Taxation is a legislative function, *Gautier* v. *Ditmar,* 204 N. Y. 20 (1912), and wide latitude exists for permissible state taxation. Such limitations on state taxation as exist result from long continued judicial interpretation of the general clauses of the Federal Constitution such as the Commerce Clause. Whether a state may validly make

interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). A tax on the unapportioned gross receipts of interstate business or on the privilege of conducting such business has long been forbidden by this Court as an undue interference with interstate commerce. *Joseph* v. *Carter & Weekes, supra.* However, where the legislature has selected an event, or a transaction, or a part of a business which is local and short of commerce the subject of the tax has been upheld even though gross receipts are used as a measure and interstate commerce may be affected but not regulated. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940), and cases cited in footnotes, p. 47; where the taxable event was the delivery of title or possession on a sale; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), where the privilege of manufacturing, only a part of a business, was taxed; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), where the privilege of preparing, printing and publishing, the manufacturing, of magazines distinct from circulation was taxed. Where the line is drawn in fixing the subject of the tax, is for the legislature not the courts. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937).

The legislatures of the State and the City of New York made business in its widest possible sense the subject of this tax.* *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302 (1958); *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48 (1953), aff'd no opinion, 307 N. Y. 762 (1954). The legislature also made the measure of the tax a percentage of "all the receipts * * * from such profession, vocation, trade, business or commercial activity * * *." The legislature did not make a local transaction, "a sale of goods in which delivery is taken by the purchaser within the seller's state,"

" * * any trade, business, profession, vocation or commercial activity." (Section B46-2.0, Appendix B, p. 21, Statement as to Jurisdiction.)

the taxable event. However, the legislature drew the line to encompass and reach the entire operations of business including transportation which is interstate commerce.

In *Matter of The New Yorker Magazine* v. *Gerosa*, 3 N. Y. 2d 362 (1957), appeal dismissed for want of a substantial Federal question (356 U. S. 399), the Court of Appeals of the State of New York, in effect, changed the legislature's boundary lines to shrink the subject of the tax to a separable part of the business. The court there said, at p. 367, "In the present case appellant, as we have seen, had its printing done outside the State but it would seem that was merely a separable part of its total method of doing business. *And the tax here is not on the printing of the magazine but on the New York sale of its advertising.*" (Emphasis supplied.) Having thus drawn in the lines the Court of Appeals held that the *Western Live Stock* decision of this Court was controlling.

In *Matter of Steinbeck, supra,* the subject of the tax was again held to be "all businesses" but it was held that the New York City tax was "a general tax" of which "the sole object is revenue notwithstanding the fact that *the tax is styled a 'privilege tax'*" and that it was not intended to regulate those covered by its provisions.

In this case the Court of Appeals of the State of New York has further constricted the legislature's boundary lines of the New York City business tax to a mere "local transaction • • • that is made the taxable event" and held that this Court's decisions in the *Wood Preserving* and *Harvester* cases, *supra,* were indistinguishable. In his motion to dismiss appellee argues, on p. 7, that the New York tax is on the sale of goods and, on p. 11, that it is the same as the Indiana tax in that "both are imposed on persons engaged in business • • • for the privilege of carrying on business, measured by the gross receipts from such business." The court below did not and could not hold that the Indiana tax was imposed on the privilege of carrying on business as this Court had held the contrary. *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 310, 312-314 (1938).

At the present time, under the judicial interpretation of the Court of Appeals described above, the New York City Business Tax Law is four different types of tax. It is actually applied to appellant's business as two of those types. Where the beer is transported by common carrier trucks to customers outside New York the tax is treated as a tax on the privilege of doing business and the receipts are allocated in accordance with the principles laid down in *Spector Motor Service* v. *O'Connor, supra,* and *United Air Lines* v. *Joseph, supra.* Where the beer is transported by contract carriers distinguishable only by a different Interstate Commerce Commission license, or by a customer's truck, the tax is treated as a direct tax on receipts like a sales tax and the entire unallocated gross receipts are taxed under the principles of *Wood Preserving.*

Although they were not in issue for the court below, where the beer was delivered by appellant's (the seller's) own trucks to customers in metropolitan New Jersey the receipts were reported as required by appellee's regulations and taxed as allocable receipts from interstate commerce. City's Exhibit B (not printed), fols. 276-277, pp. 92-93. Under the Court of Appeals decision here the receipts from such deliveries are not taxable since the "taxable event," delivery, occurred in New Jersey. Under the *New Yorker* decision, however, applying *Western Live Stock* or *American Mfg. Co.* such receipts would be wholly taxable since the brewing—a separable local part of the business—was done in Brooklyn. In the case of an out-of-state brewer who sold and shipped beer into the city, the reverse of appellant's business, the same judicial interpretation as here could lead to a New York City business tax on the entire gross receipts on the authority of *Berwind-White, supra.*

The Court of Appeals of the State of New York in this and the other cases referred to above has decided the constitutional issues involved with variable adherence to a definition of the subject or operating incidence of the New

York City business tax contrary to *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 (1944).

The protection from interference intended to be afforded to commerce between the states by the Constitution is set at naught if the Court of Appeals of New York be permitted to continue shifting and changing the "constitutional channel" of this New York City tax from business, to a part of a business, to a mere transaction or event in a part of a business as the facts may suggest, so that a decision of the United States Supreme Court upholding that type of tax will be found applicable.

Last year the City of New York collected revenue of $98,002,676.27 from this general business tax. Annual Report of the Comptroller of the City of New York for Fiscal Year 1957-58, p. 187.

This case should be considered along with the motion for leave to file a second petition for rehearing in *The New Yorker Magazine, Inc.* v. *Gerosa* (October 1957, Term, No. 816), now pending before the Court. In *The New Yorker* case, the Court of Appeals sustained the tax as being indistinguishable from *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), in which this Court sustained a New Mexico tax as "one for the privilege of doing a local business." 303 U. S. at 261. In the present case, the court below held that the New York City tax is completely similar to the Indiana tax, which was squarely held by this Court not to be a tax upon the privilege of the transaction of business, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 310 (1938), but "a tax upon gross receipts from commerce." *Id.* at 311. As a "direct unapportioned tax on gross receipts," *Freeman* v. *Hewit*, 329 U. S. 249, 257 (1946), the Indiana tax was held by this Court in *Adams Mfg. Co.* v. *Storen*, at 312-14, and in *Freeman* v. *Hewit*, *supra*, at 258, to be different from the tax "upon the privilege of manufacturing within the State," 304 U. S. at 312-13, upheld in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), the "authority * * * deci-

sive" of the *Western Live Stock* case, *supra*, 303 U. S. at 258.

The New York City tax cannot be both a tax on the privilege of doing business, the entire operations, of the type of tax in *Carter & Weekes*, and a tax on the privilege of doing a local business of the type in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), and *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and also a direct tax on gross receipts like the Indiana tax in the *Adams* and *Freeman* cases or in the *Wood Preserving* and *Harvester* cases which were based on *Berwind-White*, *supra*, the New York City sales tax case.

The Court of Appeals should not be permitted to change its position from case to case as to the nature of the New York City tax involved, sustaining one as a tax on doing a local part of a business (as in *The New Yorker* case) and another as a tax directly on receipts the same as a sales tax (as in the present case).

The City's discussion of the opinion below and the Indiana tax is incorrect in several respects. This Court did not hold in *Adams Mfg. Co.* v. *Storen* that the Indiana tax is a tax on the privilege of doing business, as the City asserts at p. 10 of its motion. On the contrary, this Court held in the *Adams* case, 304 U. S. 307, at 310, 312-14, that the Indiana tax is not "for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

Further, the City is wrong at p. 11 of its motion where it says that the court below held in this case that the New York City tax is a tax on "the privilege of carrying on business" and is therefore the same as the Indiana tax. The court below did not and could not say that the Indiana tax is a tax for the privilege of carrying on business. On that point this Court has already held that the Indiana tax is not such a tax, as above noted.

Conclusion

The question presented here is one of general importance. It involves the nature of the New York City tax and its correct application to thousands of taxpayers. It involves many millions of dollars of tax which are being collected on a continuing basis.

The opinion below adds to the confusion in the field of local taxation of, or measured by, gross receipts by eliminating in one fell swoop a distinction between the Indiana type of direct gross receipts tax and the tax on the privilege of doing business which this Court has carefully demarked in a series of decisions extending over a generation of time.

It is respectfully submitted that jurisdiction should be taken of this appeal for the purpose of clarifying the circumstances under which transportation by common carrier is significant in respect of interstate commerce.

It is further submitted that this Court should clarify the incidence of the New York City General Business and Financial Tax so far as Federal Constitutional protection of interstate commerce is concerned.

Appellee's motion should be denied and the substantial Federal questions here involved should be given plenary consideration by this Court.

Respectfully submitted,

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December 1958.